In the Supreme Court of the United States

No. 79-590

THE TELEX CORPORATION, et al.,
Petitioners,

vs.

BROBECK, PHLEGER & HARRISON,
Respondent.

Brief In Opposition to Petition for Writ of Certiorari

MOSES LASKY
One Market Plaza
Steuart Street Tower
San Francisco, CA 94105
(415) 546-0200
Attorney for Respondent

Of counsel
LASKY, HAAS, COHLER & MUNTER

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Neither question stated in the petition as presented is in the case, because the court below did not decide any question of fact.

The petition should be denied, for two separate reasons: (1) It was not filed in time. (2) It has no merit.

I. The Petition Is Untimely, Having Been Filed One Week Late

The petition correctly states that the judgment of the Court of Appeals was rendered on July 5, 1979, but erroneously states that a petition for rehearing was filed on July 19, 1979. The petition for rehearing was not filed until July 23, 1979, as is shown by a certified copy of the docket entries in the court below lodged with this brief.

The time for filing a petition for rehearing being 14 days (Rule 40(a), Fed. Rules of App. Proc.), that petition was 4 days late. A petition for rehearing does not operate to extend the time to petition for certiorari unless it is timely; otherwise there

is no presumption that the court acted on its merits. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 147 (1942), *Safeway Stores, Inc. v. Coe*, 136 F.2d 771, 773, 774 (D.C. Cir. 1943); *Denholm & McKay Co. v. Commissioner of Internal Revenue*, 132 F.2d 243, 247-249 (1 Cir. 1942).

The petition for writ of certiorari was not filed until October 10, 1979, ninety-seven days after the judgment and therefore one week too late. The defect is jurisdictional.

II. The Petition Lacks Merit

This Court has often noted that its certiorari jurisdiction is used only to review and settle important questions of federal law, not to give a second appellate review to cases of concern only to litigants.[1]

This case is of concern only to the litigants. Here jurisdiction of a federal court rested solely on diversity of citizenship. The subject matter is a written contract, unique in substance and language to the parties and of no general interest. The issue was one of interpretation of that particular contract. The contract being a California contract, its interpretation is a matter of California law.[2]

In an effort to construct a federal question to engage the Court's attention, petitioners advance two arguments, one of constitutional law and one of power of a court under F.R.Civ.P. Rule 56, the summary judgment rule. But no constitutional question was raised, presented, or decided at any stage in either court below. As this Court has often observed, it does not ordinarily consider issues neither raised nor considered by the Court of Appeals. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2; *Tennessee v. Dunlap*, 426 U.S. 312, 314, fn. 2 (1976); *National*

1. E.g., letter of all the justices of the Court to Senator De Concini, June 22, 1978, quoted in 68 American Bar Journal, 1328 (Sept. 1979)

2. As stated in the opinion below, all parties treated the case as governed by California law. (Pet.App. 8a, fn. 2)

Labor Relations Board et al. v. Sears, Roebuck & Co., 421 U.S. 132, 163, 164; *Duignan v. United States*, 274 U.S 195, 200 (1927).

Moreover, both the constitutional question and the supposed Rule 56 question are based on the same erroneous assumption that the court below decided a question of fact. It did not. It is an elementary rule, certainly of California law, that interpretation of a contract is always a question of law, never of fact. If the interpretation would vary with whether a fact is A or B, the fact-finder will determine the fact but the effect on interpretation is *always* a question of law. *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 207 Pac. 527 (1922); *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865; 44 Cal.Rptr. 767 (1965, by Traynor, C.J.); *Brawthen v. H & R Block, Inc.*, 28 Cal.App.3d 131, n.1, 104 Cal.Rptr. 486 (1972), where the court said:

> "The *interpretation* of a contract, written or oral, is always a question of law for the court. There may be circumstances, not existent here, where the interpretation of one or more contractual versions permitted by the evidence is at issue. The question as to which was the contract of the parties would be one of fact, while the interpretation (if necessary) of that contract would remain a question of law." [Italics in original]

The principle is universal. In *Atwood v. City of Boston*, 310 Mass. 70, 37 N.E. 2d 131, 134 (1941):

> "But from whatever source light may be thrown on the contract * * * its meaning, what promises it makes, what duties or obligations it imposes, is a question of law for the court."

And, of course, whether an asserted fact is material, that is, whether it has any bearing at all on interpretation, is a question of law.

The petitioners' Oklahoma counsel refer to what they call an "unusual California parole evidence rule" but appear not to understand it. In some states, perhaps many, the rule is that, if a written contract is unambiguous on its face, extrinsic evidence will not be looked at by either judge or jury. The California rule postulates that what seems unambiguous on its face may turn out to be ambiguous in the light of extrinsic evidence and therefore allows preliminary examination of extrinsic evidence by the judge to determine admissibility. But the questions whether the contract is ambiguous and what effect, if any, the extrinsic evidence then has on interpretation are still questions of law. *Airborne Freight Corporation v. McPherson,* 427 F.2d 1283 (9 Cir. 1970).

Here the interpretation turned on no disputed fact. The contract was in writing, and there was no dispute as to what the writings were. Only one dispute of fact is claimed by petitioners. They claim that at a preliminary and exploratory meeting in San Francisco, petitioners' president, Mr. Jatras, said that Telex could pay a fee only if money was recovered out of which to pay. But, *for the purpose of the motion for summary judgment,* the fact was taken to be *exactly as petitioners claimed.* In respondent's brief in the Court of Appeals, we said (at p. 8):

> "Since we are here on a summary judgment case, we proceed as if the fact is as Jatras testified"

and that (p. 9):

> "it is irrelevant whether Jatras did or did not make the remarks attributed to him".

Similarly the Court of Appeals held that the fact was irrelevant to interpretation.

That court's opinion notes that Telex presented three contentions (Pet.App. p. 8a) and describes the pertinent one[3] as being a contention that "The correct interpretation of the contract re-

3. The other two contentions were that respondent had been discharged and that the fee was unconscionable. Neither question is presented in the petition.

quires resolution of disputed factual issues". The court's answer was that interpretation did *not* require resolution of any disputed factual issue. In the most explicit language (Pet.App., p. 13a), the court said,

> "[h]aving carefully reviewed this evidence, *taking the facts presented by Telex as true and resolving all doubts in its favor* [citation omitted] we agree with the district court. We find that this evidence, if anying, compels our interpretation of the contract." [Emphasis Added]

Thus accepting Jatras' testimony as true, the court's ultimate conclusion was (Pet.App., p. 17a):

> "Thus, we find that the extrinsic evidence offered by Telex did not make the contract reasonably susceptible to its interpretation. The contract remained unambiguous and disposition of the case by summary judgment was appropriate."

In short, the court did not perform a *fact finding function* or resolve any dispute of fact. Accepting the facts as claimed by petitioners, it performed the purely judicial function of interpretation. The correctness of that *judicial determination* is not a question which petitioners seek to have this Court review. Nor could it be, because the application of acknowledged principles of law to the particular facts of a case is no basis for certiorari. This Court should not be asked to review the particularities of a case for a third time in order to choose between litigants.

Nevertheless, as a matter of personal privilege, we may quickly show that the judgment below was inescapable. All the witnesses were in accord that no agreement was reached at the San Francisco meeting (Pet.App. 3a). The situation was that at that exploratory meeting, accepting Jatras' testimony, he had expressed a basis on which he wished to engage respondent, but respondent had stated the terms on which it would accept engagement, and those terms did not embrace limiting compensation to cash collected. Petitioners could either accept the terms suggested by

respondent or look elsewhere. Mr. Jatras returned home, prepared a written draft of the kind of agreement which he desired, and sent it to respondent. *If* his proposal had been accepted, it would have provided the very agreement for which petitioners now contend. But respondent, in writing, rejected Mr. Jatras' proposal and counterproposed a different agreement. Regardless of what Mr. Jatras had said in San Francisco, by agreeing to the counterproposal petitioners bound themselves to a different contract. As the court below observes (Pet.App. 16a), "the construction of the contract that Telex is presently advancing on appeal is the one contained in the version that was rejected by Brobeck . . . Brobeck, however, by excluding this limitation in its version sent Telex and to which the parties finally agreed, specifically rejected such a contract."

That is the simplicity of the case.

CONCLUSION

The petition is not only out of time; it seeks to present questions that do not exist. We respectfully submit that it should be denied.

Dated: San Francisco, California
November 6, 1979

MOSES LASKY
Attorney for Respondent